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Taxation

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TAXATION

by

Cynthia M. Ohlenforst* and Jeff W. Dorrill**

I. SALES TAX

A. Application of the Tax

TAXPAYERS were generally unsuccessful in the appellate cases decided during the survey period.*** *Hammerman & Gainer, Inc. v. Bullock*¹ is the only reported case during the survey period to deal with a tax on services. This case is significant primarily for its substantive analysis of insurance service and for its emphasis on the importance of the comptroller's administrative interpretations in the context of Texas tax on insurance services.² Its holding that the Administrative Procedure and Texas Register Act as in effect at the time of the suit³ authorized a taxpayer to test the validity of a tax statute by a declaratory judgment action is also noteworthy.⁴ Relying on the statutory provision that excludes "insurance coverage for which a premium is paid"⁵ from the definition of taxable insurance services,⁶ appellants argued unsuccessfully that the charges to regulated insurance carriers for claims adjustment are ultimately borne by the premium payor, so that the claims adjustments services constitute services that are part of insurance coverage for which a premium is paid and are therefore nontaxable.⁷ The court looked to the statutory language,⁸ the challenged

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*** Cases, regulations and other developments that fell within this survey period but were included in last year's survey article are not included in this article. See Ohlenforst & Dorrill, *Taxation, Annual Survey of Texas Law*, 44 Sw. L.J. 651, 654 (1990) [hereinafter Ohlenforst & Dorrill, 1990 Survey].

1. 791 S.W.2d 330 (Tex. App.—Austin 1990, no writ).

2. See TEX. TAX CODE ANN. §§ 151.0039 (Vernon Supp. 1991) (defining "insurance service"); 151.0101 (Vernon Supp. 1991) (insurance services taxable as of October 1, 1987).

3. See TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1991) (Administrative Procedure and Texas Register Act section authorizing declaratory judgment suits). The Tax Code now specifically prohibits declaratory judgment suits to contest the validity of a tax. See TEX. TAX CODE ANN. § 112.108 (Vernon Supp. 1991).

4. 791 S.W.2d at 331. Comptroller had argued that TEX. TAX CODE ANN. §§ 112.001-.156 (Vernon 1982 and Vernon Supp. 1991) (protest suit provisions of the Tax Code) provided the exclusive means of contesting the validity of taxing statute.

5. TEX. TAX CODE ANN. § 151.0039(b) (Vernon Supp. 1991).

6. *Id.* § 151.0039(a).

7. 791 S.W.2d at 332.

8. TEX. TAX CODE ANN. §§ 151.0039(a) & (b) (Vernon Supp. 1991).

administrative rule,⁹ and a recent attorney general opinion¹⁰ to support its conclusion that the exclusion for coverage for which a premium is paid is meant to exclude only transactions that consist of a payment for insurance and not the expenditures for which the premium is ultimately used.¹¹

*Southwest Airlines Co. v. Bullock*¹² also addressed both substantive and procedural issues. Southwest Airlines argued that a statutory exemption from sales and use tax for property brought into the state for "use as a licensed and certificated carrier"¹³ exempted from taxation the business entity using the aircraft rather than only the aircraft.¹⁴ The airline argued that virtually all personal property used in the airline's business was therefore exempt.¹⁵ The court, however, upheld the comptroller's administrative interpretation,¹⁶ and further held that the exemption as then in effect¹⁷ for aircraft component parts did not extend to "passenger convenience items" such as pillows and blankets.¹⁸ The court also overruled Southwest's points of error with respect to the lower court's conclusions that hydraulic fluid and other items were taxable maintenance items rather than exempt repair or replacement parts,¹⁹ and that neither mobile baggage equipment nor plastic cups used by the aircraft were exempt.²⁰

The court's reliance on administrative interpretation is of more importance to most taxpayers than is the court's aircraft-specific holding. Southwest argued that the trial court erred in accepting evidence of the comptroller's unpublished policy interpretations.²¹ Based in part on its reasoning that the comptroller's position is expressed in documents that are made available for public inspection,²² even if not "published," the court not only agreed that the testimony of comptroller representatives was acceptable, but also gave significant weight to administrative interpretation.²³

9. 34 TEX. ADMIN. CODE § 3.355 (1989) (specifically including activities to adjust losses as taxable).

10. Op. Tex. Att'y Gen. No. JM-1016 (1989).

11. 791 S.W.2d at 333. The court specifically concluded, "if the Comptroller's interpretation of the scope of insurance services is reasonable, in that it harmonizes with the statute, then this Court is bound to accept his interpretation regardless of the possible existence of other reasonable interpretations." *Id.*

12. 784 S.W.2d 563 (Tex. App.—Austin 1990, no writ).

13. TEX. TAX CODE ANN. § 151.330(c), as in effect for the years at issue, provided an exemption for the use of certain tangible personal property "moved into this state for use as a licensed and certificated carrier of persons or property." 784 S.W.2d at 566.

14. 784 S.W.2d at 568.

15. *Id.*

16. *Id.*; see 34 TEX. ADMIN. CODE § 3.297 (1989) (rule with respect to carriers) (amendments proposed Dec. 7, 1990, 15 Tex. Reg. 7010).

17. See TEX. TAX CODE ANN. § 151.328(a)(1) (Vernon 1982). This exemption was expanded in 1989. See Ohlenforst & Dorrill, 1990 Survey, 44 Sw. L.J. 651, 654 (1990), for a description of the 1989 revisions to this section.

18. 784 S.W.2d at 569.

19. *Id.* at 569-70 (relying heavily on fact findings by the lower court).

20. *Id.* at 570-72.

21. *Id.* at 566-67.

22. *Id.* at 567.

23. *Id.*

*South Texas Chlorine, Inc. v. Bullock*²⁴ affirmed a lower court summary judgment holding that a taxpayer who purchased empty containers, filled them with chlorine gas, and leased the containers in conjunction with sales of the gas was liable for use tax (as opposed to sales tax), and that the exemption from sales tax for certain containers was inapplicable.²⁵

As in past years, significant issues were resolved in unreported opinions. *Bullock v. Foley Brothers Dry Goods Corporation*,²⁶ for example, reversed a lower court holding that the comptroller could not proceed against Foley as a customer for sales tax that the seller had not collected. Foley had convinced the district court that if the vendor failed to charge sales tax, the comptroller could not assess the tax against the buyer. Another unreported appellate case²⁷ focused on whether certain property was consumed in contracts to improve real property and was therefore exempt.²⁸

United States Supreme Court decisions rendered during the survey period are likely to have a profound effect on state tax administration. *McKesson Corp. v. Florida*²⁹ and *American Trucking Associations, Inc. v. Smith*³⁰ each discuss the circumstances which require a state to refund payments made pursuant to a statute that is later declared unconstitutional.

McKesson involved a Florida alcoholic beverage excise tax that discriminated in favor of Florida manufacturers. After a Supreme Court decision held a tax similar to Florida's then-existing tax unconstitutional,³¹ Florida revised its tax scheme by enacting a slightly different tax. This tax was subsequently found unconstitutional, on a retroactive basis, insofar as it discriminated against interstate commerce.³² In writing for a unanimous Supreme Court, Justice Brennan concluded that when a state has placed a taxpayer under duress to pay a tax, and relegated him to a post-payment refund action, due process "obligates the State to provide meaningful back-

24. 792 S.W.2d 275 (Tex. App.—Austin 1989, no writ).

25. *Id.* at 276.

26. No. 3-89-124 (Tex. App.—Austin, Dec. 19, 1990) (unreported). The appellate decision is consistent with Op. Tex. Att'y Gen. No. M-165 (1967) (sales tax can be collected from either buyer or seller). The result in the overruled district court decision (No. 396,462, Dist. Ct. of Travis County, 353d Judicial Dist., filed May 23, 1989), which surprised many tax practitioners, was based in part on the district court's conclusion that the comptroller may not assess tax against vendors who, without issuing resale or exemption certificates, purchase from in-state sellers unless the comptroller first ascertains that the seller has not already remitted the tax. The district court was also influenced by evidence that for many years the comptroller had followed an audit procedure known as the "Texas Vender Policy" pursuant to which auditors assessed tax against buyers only if the vendor was bankrupt or out of business or the buyer had given the vendor a resale or exemption certificate and then used the property in a taxable manner, and that Foley had relied to its detriment on that policy.

27. *Bullock v. Morrison-Knudsen, Inc.* (No. 3-88-268) (Tex. App.—Austin, Apr. 18, 1990) (unreported).

28. See TEX. TAX CODE ANN. § 151.056 (Vernon 1982 & Supp. 1991) (exemption from tax for certain property consumed in contracts to improve real property).

29. 495 U.S. —, 110 S. Ct. 2238, 110 L.Ed.2d 17 (1990).

30. 495 U.S. —, 110 S. Ct. 2323, 110 L.Ed.2d 148 (1990).

31. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

32. The Supreme Court's opinion includes a thorough background. See *McKesson*, 110 S. Ct. at 2242-44.

ward-looking relief to rectify any unconstitutional deprivation."³³ According to the Court, such relief might take the form of refunds to certain taxpayers, certain permissible forms of collection of back taxes from taxpayers who had been favored by the unconstitutional tax, or some combination of these methods.³⁴

In *American Trucking* a badly-split court concluded that the Arkansas tax at issue should be treated as unconstitutional on a prospective-only basis, and that prospective application was to begin from the date the tax was determined to be unconstitutional by the lower court.³⁵ The Court remanded the case to the Arkansas Supreme Court to try again to craft appropriate prospective relief.³⁶

Ford Motor Credit Co. v. Florida,³⁷ a pending Supreme Court case, focuses on the constitutionality of Florida's business situs intangible property tax, and is likely to further refine the Court's analysis of states' ability to extend their taxing jurisdiction.³⁸

The trend toward terse administrative decisions in comptroller hearings continued, as the comptroller again issued hundreds of decisions. In one administrative decision³⁹ dealing with the occasional sale exemption, the comptroller acknowledged that the statutory exemption for a sale of an identifiable segment of a business⁴⁰ can apply even if income and expenses attributable to the segment have not been separately accounted for,⁴¹ so long as income and expenses could be separately calculated. The administrative law judge concluded, however, that because the seller had no books and records from which the income and expenses could be determined, the exemption did not apply.⁴² Other administrative decisions refused to allow an occasional sale exemption in circumstances in which the asset sold had not produced any income.⁴³

33. *Id.* at 2247.

34. *Id.* at 2258.

35. *American Trucking*, 110 S. Ct. at 2335-36.

36. *Id.* at 2343. This case and *McKesson* could easily be the subject of a separate article. Both decisions follow the test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), that prospective-only relief for an unconstitutional tax is appropriate if the decision at issue establishes a new principle of law that overrules past precedent or is a case of first impression, whether retrospective operation of the rule will further or retard its operation, and if equitable factors favor prospective application. Notwithstanding the fact that this test has been in existence for some twenty years, an increasing number of current cases are focusing on whether amounts paid pursuant to a tax that is subsequently declared unconstitutional may or must be refunded. See, e.g., *Ashland Oil, Inc. v. Caryl*, 497 U.S. —, 110 S. Ct. 3202, 111 L.Ed.2d 734 (1990); *National Mines Corp. v. Caryl*, 497 U.S. —, 110 S. Ct. 3205, 111 L.Ed.2d 740 (1990); *James B. Beam Distilling Co. v. Georgia*, U.S. S. Ct. No. 89-680, 110 L.Ed.2d 637, *cert. granted* (June 11, 1990).

37. No. 88-1847 (U.S.) (oral argument Nov. 6, 1990).

38. Ford challenged Florida's tax on Ford's accounts receivable arising from motor vehicle financing. See Daily Tax Report at G-4 to -5 (BNA Nov. 7, 1990).

39. Comptroller Hearing No. 25,090 (Aug. 2, 1990).

40. TEX. TAX CODE ANN. § 151.304(b)(2) (Vernon Supp. 1991).

41. Comptroller Hearing No. 25,090.

42. See also TEX. TAX CODE ANN. § 151.304(b)(2) (Vernon Supp. 1991) (sale of an identifiable segment of a business constitutes an occasional sale).

43. See, e.g., Comptroller Hearing No. 26,410 (Oct. 3, 1990) (airplane used to transport

The comptroller's success continued in his efforts to impose successor liability pursuant to section 111.020 of the Texas Tax Code.⁴⁴ In one administrative decision the taxpayer franchisor argued that it had not purchased the business and therefore could not be liable under section 111.020.⁴⁵ The administrative law judge found that the evidence did not support the taxpayer's claim that it had merely terminated a franchise and leasing relationship rather than repurchasing the franchise interests; therefore, the taxpayer was held liable.

In Decision 24,670⁴⁶ the comptroller imposed tax on a three-party transaction that was structured to rely on back-to-back exemptions. A bank sold a boat to seller who purchased tax-free pursuant to a resale certificate. On the same day, seller sold to buyer in a transaction intended to be tax-free on the ground that the seller made only one sale during the relevant twelve-month period.⁴⁷ The comptroller held that the seller's application for a sales tax permit (sought by the seller in order to give a resale certificate) precluded the seller's reliance on the occasional sales tax exemption.⁴⁸

The comptroller denied an exemption for resale in Decision 26,088⁴⁹ on the ground that the taxpayer (which was in the business of providing telecommunications services to its customers) did not transfer "the care, custody and control" of the purchased switching equipment to its customers as part of providing telecommunications services.⁵⁰ The decision highlights the difficulty that taxpayers may face in trying to establish that tangible personal property is transferred to customers as part of providing a taxable service.⁵¹

employees but not to produce income). This decision may represent the administrative law judge's belief that the airplane was never intended to function as a separate business segment rather than a statement of a legal rule. *See also* Comptroller Hearing No. 25,368 (Jan. 17, 1990) (no occasional sale exemption because parties' agreement, which they had prepared themselves, did not accurately reflect their intent. Kudos to the administrative law judge for commenting that "[a]ttorneys, though much maligned in the media, do serve a necessary purpose. Those who would substitute informal judgments for legal formalities frequently find themselves subject to unforeseen risks and consequences."). *Id.*

44. *See* TEX. TAX CODE ANN. § 111.020(a) (Vernon Supp. 1991) (if a person liable for taxes under Title II of the Tax Code "sells the business or stock of goods of the business or quits the business," a successor buyer who fails to withhold the amount of the purchase price necessary to cover the taxes will become liable to the extent of the purchase price); *id.* § 111.020(c) (procedure by which the purchaser of a business may request a certificate from the comptroller that no taxes are due). Despite the protection offered by this provision, however, buyers and sellers are often reluctant to approach the comptroller's office asking for an analysis of potential tax liability.

45. Comptroller Hearing No. 25,932 (March 26, 1990).

46. Comptroller Hearing No. 24,670 (Feb. 6, 1990).

47. *See* TEX. TAX CODE ANN. § 151.304(b)(1) (Vernon Supp. 1991) (exemption for one or two sales during a 12-month period by a person who, *inter alia*, does not hold himself out as engaging in the business of selling).

48. The statute specifically provides that the exemption for fewer than three sales in a year is not available to persons who hold sales tax permits. *Id.* § 151.304(f). The facts presented at the hearing indicate that the seller had applied for the permit the day before the sale; the seller therefore may not have "held" a permit at the time of the sale.

49. Comptroller Hearing No. 26,088 (July 25, 1990).

50. The tax on telecommunication services was considered in several administrative hearings, including Comptroller Hearing No. 25,426 (Nov. 30, 1989) (usage charges for connecting mobile phone taxable).

51. Administrative rules with respect to taxable services make clear that resale exemp-

Although there are still very few helpful administrative decisions construing the relatively new services taxes,⁵² decisions interpreting these services taxes are becoming more common. As in the past, several administrative decisions dealt with the difference between tangible personal property and real property, a distinction that will remain particularly important in the context of taxable services. In Decision 25,088,⁵³ for example, the comptroller held that welding services on a drilling rig were taxable services for the repair, remodeling, maintenance, and restoration of tangible personal property since there was no evidence that the drilling rig was incorporated or attached to realty in a manner that would cause it to become real property. In Decision 24,972⁵⁴ the comptroller held that, on the evidence presented in that hearing, computer cabling installed in buildings under construction constituted nontaxable improvements to real property rather than taxable sales of tangible personal property. Several additional decisions focused on whether property was used in manufacturing within the meaning of section 151.318 of the Tax Code.⁵⁵ This is an inquiry that is likely to become a frequently contested area as taxpayers seek refunds of sales taxes under this newly effective provision. This section of the Code permits the taxpayers to claim refunds for a portion of the sales tax paid on the purchase of certain machinery and equipment used in manufacturing, processing, fabrication, or repair of tangible personal property for ultimate sale.

The large number of administrative decisions issued every year is, in part, a reflection of the varied areas of law that are involved in administrative challenges each year, many of which are of interest primarily to specialized groups of taxpayers. There are, for example, decisions that are of significant interest to taxpayers in the business of leasing⁵⁶ and to taxpayers with issues

tions apply to property sold as part of a taxable service only if the "care, custody, and control" test is met. See 34 TEX. ADMIN. CODE § 3.330(c)(1) (eff. Nov. 13, 1989, 14 Tex. Reg. 5786) (one of several rules using this standard).

52. Many taxable services have been taxable in Texas only since 1987. See generally Ohlenforst & Dorrill, 1990 Survey, 42 Sw. L.J. 633, 636-40 (1988). It is only recently that audits concerning these taxes are reaching the administrative hearing and litigation stage.

53. Comptroller Hearing No. 25,088 (Mar. 14, 1990).

54. Comptroller Hearing No. 24,972 (Jan. 4, 1990).

55. TEX. TAX CODE ANN. § 151.318 (Vernon Supp. 1991).

56. See Comptroller Hearing No. 21,106 (Aug. 21, 1990, reversing original decision issued Aug. 23, 1989). This decision is of particular interest; the original decision (cited at Ohlenforst & Dorrill, *supra* note 17, at 653 n.21) held that tax was accelerated following an assignment of taxpayer's operating leases, on the ground that the assignment did not constitute a loan. The decision upon rehearing concluded that the facts were virtually identical to Comptroller Hearing No. 21,992 (Aug. 25, 1989) (also cited at Ohlenforst & Dorrill, *supra* note 17, at 653 n.21), and therefore altered the result of the case "without endorsing the reasoning therein." The administrative law judge further concluded on rehearing that taxpayer was in some circumstances not relieved of the responsibility to collect tax on the post-assignment lease payments. See also Comptroller Hearing No. 25,901 (May 24, 1990) (assignment of lease payments as collateral for a nonrecourse loan, when a taxpayer is "relieved from all liability beyond the value of the lease and equipment pledged as collateral is tantamount to factoring the lease," (emphasis in original) so that tax was due on all remaining lease payments). Cases are also pending in district court regarding lease factoring; *E.g.*, Lenier Business Products, Inc. v. Bullock, No. 436,069 (Dist. Ct. of Travis County, 200th Judicial Dist. of Texas, filed Feb. 8, 1988).

relating to certain exemptions for the use of gas and electricity.⁵⁷ Many decisions, however, raise procedural or detrimental reliance issues that are of broader interest. Decision No. 25,856,⁵⁸ for example, provides an interesting discussion of a taxpayer's detrimental reliance on an administrative rule that, according to the administrative law judge "was not incorrect, but . . . did not go far enough."⁵⁹ The administrative judge in that decision noted that provisions such as the rule at issue "do nothing to clarify the tax statutes, and do not aid businesses in understanding the law." In that case, as in others, the administrative law judges appear more sympathetic toward a detrimental reliance argument when the law itself is unclear.⁶⁰ Although the decisions on detrimental reliance continue, appropriately, to be fact-based, and although the standards cited are not always precisely the same, decisions in this area offer some guidance to taxpayers as to whether their reliance on comptroller advice offers a defense to a failure to pay the taxes.⁶¹

B. Legislative and Regulatory Developments

The school funding issue that dominated multiple special sessions of the legislature gave rise to concerns that the legislature might further expand the sales tax base as a partial solution for the education problems. Legislators settled, however, for increasing the state sales tax rate from six percent to six and one-quarter percent.⁶²

57. See Comptroller Hearing No. 25,187 (Feb. 12, 1990) (taxpayer's predominant use of electricity, rather than the predominant use of his campground customers, determined that use was commercial and therefore not exempt); Hearing No. 25,761 (Feb. 27, 1990) (use of electricity to maintain or prevent deterioration of plant is a nonexempt, commercial use).

58. Comptroller Hearing No. 25,856 (June 27, 1990).

59. *Id.* The administrative law judge concluded that 34 TEX. ADMIN. CODE § 3.297(c)(6) (1989), which provided that sales tax is not due "on separately stated installation or delivery charges" was misleading enough to justify the taxpayer's failure to realize that only charges for deliveries that occurred after sale of the parts were exempt.

60. See also Comptroller Hearing No. 24,996 (Feb. 14, 1990) (determining that a taxpayer's apparent misunderstanding of advice received from the comptroller was attributable to the comptroller's confusing policy on the plant maintenance services at issue).

61. See also Comptroller Hearing No. 24,873 (Nov. 27, 1989) (accepting taxpayer's credible testimony as to reliance on oral information from comptroller employees and noting that "[t]hrough certain pronouncements in decisions dealing with 'detrimental reliance' may address the evidence necessary to prove it, no rule has ever been adopted. Thus the matter of sufficient proof has evolved case by case.") *Id.* This decision, like the ones cited above, appears to be influenced by the fact that certain information in publications from the comptroller "did not make it clear to the average businessman which, if any, of the labor or services performed" were taxable. *Id.* This decision observes that in order to prove detrimental reliance the taxpayer must show that (1) he received specific, incorrect information; (2) the information came from a comptroller employee authorized to give the information; (3) the employee was given all the correct factual information necessary; (4) the taxpayer relied on the incorrect information; and (5) the taxpayer suffered harm or damages). *But see* Comptroller Hearing No. 25,430 (Nov. 22, 1989) (there was "no doubt" that taxpayer relied on auditor's acceptance of taxpayer's method of calculating tax on its inventory, but taxpayer was not harmed, as taxpayer had been able to make lower bids because it did not build the tax into its bids and probably got more business).

62. Act of June 7, 1990, ch. 5, (H.B. 6) 1990 TEX. SESS. LAW SERV. 41 (Vernon). Uncodified § 1.02 of this bill includes an exemption from this rate increase for certain goods and services purchased pursuant to a prior contract, thereby insuring that the comptroller's rule on prior contracts, 34 TEX. ADMIN. CODE § 3.319 (eff. Nov. 6, 1990, 15 Tex. Reg. 6197), will

Although there were fewer regulatory amendments than during periods of more significant legislative change, the ongoing process of amending regulations continued during the survey period.⁶³ One of the relatively few significant sales tax policy changes to be reflected in regulations amended during the survey period concerns the comptroller's decision to rely on *D. H. Holmes Co. v. McNamara*⁶⁴ to justify extending the scope of the Texas use tax. In *D. H. Holmes* the United States Supreme Court upheld Louisiana's imposition of use tax on catalogs prepared and mailed by out-of-state companies in circumstances where the vast majority of the catalogs were mailed to Louisiana residents.⁶⁵ Comptroller representatives had indicated informally several months ago that the comptroller would apply the *D. H. Holmes* rationale in collecting Texas use tax. The comptroller officially amended the relevant administrative rule on use tax⁶⁶ in December 1990, to provide that use tax is due on taxable items purchased outside Texas by a person engaged in business in Texas "if the taxable items are delivered at the direction of the purchaser to recipients in Texas designated by the purchaser."⁶⁷

Interpretation of the relatively new services taxes in Texas will be an ongoing process. Because too few administrative challenges to these taxes reached hearings to give rise to a significant body of administrative law outside the regulations, the regulations continued to be the best source of comptroller policy. The line between sales of services and sales of goods continues to be a blurred one in many contexts and is likely to become more important in the context of these services taxes. In one recently amended rule,⁶⁸ the comptroller provided that certain car repairs (such as battery and shock absorber replacements) are to be treated as repair services rather than as a sale of tangible personal property.⁶⁹ As more and more distinctions like this one are created, finding a consistent legal theory underlying the distinctions between goods and services and between taxable services and non-taxable services may become more difficult. In addition, the overlap between the new services taxes and formerly existing law is sometimes confusing, and requires additional regulatory amendments to effect consistency between the

remain relevant during the coming year. See Comptroller Hearing No. 26,604 (Jan. 30, 1990) regarding this rule.

63. Some comptroller rules were revised during the survey period to reflect 1989 legislative changes. See, e.g., 34 TEX. ADMIN. CODE § 3.299 (eff. Oct 5, 1990, 15 Tex. Reg. 5502) (rule on newspapers, magazines, publishers and exempt writings amended to interpret with legislative amendment to TEX. TAX CODE ANN. § 151.312 exemption for certain periodical and writings published by a redegree, philanthropic, charitable, or certain other similar organizations); see also Ohlenforst & Dorrill, *supra* note 17, at 654 n.35 (discussion of background for legislative change); 34 TEX. ADMIN. CODE § 3.329 (eff. Nov. 6, 1990, 15 Tex. Reg. 6197) (guidelines under which eligible enterprise projects may apply for refunds of sales tax).

64. 486 U.S. 24, 108 S. Ct. 1619, 100 L.Ed.2d 21 (1988).

65. 486 U.S. at 33-34, 108 S. Ct. at 1625, 100 L.Ed.2d at 29.

66. 34 TEX. ADMIN. CODE § 3.346 (eff. Dec. 21, 1990, 15 Tex. Reg. 7029).

67. *Id.* § 3.346(b)(3) (proposed language at 15 Tex. Reg. 5668). This extension of Texas use tax may be subject to challenge on the grounds that the Texas statutory language with respect to use tax differs from Louisiana statutory language.

68. 34 TEX. ADMIN. CODE § 3.290 (eff. Dec. 5, 1990, 15 Tex. Reg. 6748).

69. *Id.* § 3.290 (b)(2).

old law and the new. For example, although the administrative rule on data processing services⁷⁰ has not been modified during the survey period, the comptroller modified his rule on graphic arts. The modifications provide that sales tax is due on charges for "furnishing original letters or other printed material prepared by using word processing or other data processing equipment."⁷¹ This language would replace a specific statement that tax is not due on charges for furnishing original letters or other printed materials produced simultaneously with the original by data processing.⁷² The proposed change is an example of the wide-reaching impact that the service tax rules have on already existing rules (which are sometimes more clearly focused on end-products than on services).

The comptroller also amended the insurance services rule⁷³ as it applies to the taxability of certain services performed for self-insured entities and withdrew a proposed change to the telecommunications rule⁷⁴ that would have included facsimile services within the definition of taxable telecommunication services.⁷⁵ In other regulatory changes, the comptroller added substantially to the rule concerning the phased-in exemption for manufacturing machinery and equipment,⁷⁶ adopted an emergency rule to reinstate retroactively the exemption for utilities used for lighting directly in manufacturing areas,⁷⁷ and amended the direct payment rule to reflect the reinstated exclusion from tax for certain items held for shipment outside Texas.⁷⁸ The comptroller has also proposed a further, well-justified modification to the prior contract rule,⁷⁹ which sets forth the comptroller's policy on exemption from new taxes for goods or services provided pursuant to a contract that was binding prior to the legislation enacting the taxes. This proposed change allows contracts for goods or services "as needed" and contracts with an indefinite term to qualify for the exemption.⁸⁰ Prior administrative interpretation excluded such contracts from qualifying for the exemption.⁸¹

II. FRANCHISE TAX

A. Liability for Tax - Doing Business in Texas

The comptroller suffered another significant defeat in *Bullock v. House of*

70. 34 TEX. ADMIN. CODE § 3.330 (eff. Nov. 13, 1989, 14 Tex. Reg. 5786).

71. 34 TEX. ADMIN. CODE § 3.312 (amendment proposed July 12, 1990, 15 Tex. Reg. 4195).

72. Section 3.312 appears in its proposed and current form at 15 Tex. Reg. 4195.

73. 34 TEX. ADMIN. CODE § 3.355 (eff. May 2, 1990, 15 Tex. Reg. 2284).

74. 34 TEX. ADMIN. CODE § 3.344 (rule as in effect; eff. April 1, 1988, 13 Tex. Reg. 1342).

75. See 15 Tex. Reg. 1231 (proposed amendment withdrawn in March 1990) and 14 Tex. Reg. 4294 (amendment proposed Aug. 15, 1989).

76. 34 TEX. ADMIN. CODE § 3.300 (eff. Nov. 28, 1990, 15 Tex. Reg. 6600).

77. 34 TEX. ADMIN. CODE § 3.295 (emergency rule eff. Sept. 12, 1990 through Jan. 10, 1991, 15 Tex. Reg. 5405).

78. 34 TEX. ADMIN. CODE § 3.377.

79. 34 TEX. ADMIN. CODE § 3.319.

80. 34 TEX. ADMIN. CODE § 3.376.

81. See 34 TEX. ADMIN. CODE § 3.319(c)(3) & (5) (1989) (prior to cited amendment). See Comptroller Hearing No. 24,604 (Jan. 30, 1990) (regarding the comptroller's rule).

Lloyd, Inc.,⁸² in which the Austin Court of Appeals held that a foreign corporation that was not (and not required to be) qualified to transact business in Texas, had no offices, property or employees in Texas, but did maintain independent contractors in the state for the purpose of selling products, was not required to pay Texas franchise tax.⁸³ Section 171.001 of the Tax Code⁸⁴ imposes franchise tax on a corporation if it "does business" in Texas.⁸⁵ Prior to September 5, 1983, the comptroller defined "doing business in Texas" as transacting "some substantial part of its ordinary business in Texas."⁸⁶ Without legislative inspiration, the comptroller amended, in 1983, the administrative rule interpreting the doing business standard to provide that a corporation is doing business in Texas if it is transacting "some part of its ordinary business in Texas."⁸⁷ The comptroller interpreted this rule to cause corporations soliciting sales in Texas through independent contractors to be subject to Texas franchise tax.⁸⁸ Under the prior rule, the activity would not result in a corporation's becoming subject to the franchise tax.⁸⁹

The taxpayer in *House of Lloyd* argued that the statutory phrase "does business in this state" is ambiguous and should be interpreted strictly against the taxing authority.⁹⁰ Thus, the comptroller's long-standing interpretation (from 1941 to 1983) of the phrase should be afforded considerable weight since the legislature had repeatedly re-enacted section 171.001 without change.⁹¹ The court agreed with the taxpayer's position, stating that the legislatively approved interpretation of the "doing business" phrase by the comptroller can be changed only if prompted by clear statutory authority.⁹²

82. 797 S.W.2d 133 (Tex. App.—Austin 1990, writ pending).

83. *Id.* at 138.

84. TEX. TAX CODE ANN. § 171.001 (Vernon 1982).

85. A corporation is also subject to Texas franchise tax if it is incorporated in Texas or is qualified to do business in Texas. *Id.*

86. See Comptroller Hearing No. 10,216 (Aug. 19, 1981) (quoting Comptroller's rule promulgated in 1975 with respect to "doing business" standard).

87. 34 TEX. ADMIN. CODE § 3.406(b) (1989) (eff. Sept. 5, 1983, 8 Tex. Reg. 3236). Prior to this amendment, the "doing business" test under § 171.001 of the Tax Code and the "transacting business" test under § 8.01 of the Texas Business Corporations Act were thought to have similar meanings. The 1983 amendment made it clear that the comptroller intended the "doing business" test to require a lower threshold of activities sufficient for the franchise tax to be imposed on a foreign corporation than is necessary for a corporation to be required to qualify to do business in Texas under the "transacting business" standard.

88. *House of Lloyd*, 797 S.W.2d at 135.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 137 (citing *Humble Oil & Ref. Co. v. Calvert*, 414 S.W. 2d 172, 180 (Tex. 1967)). Apparently in response to repeated challenges to the comptroller's interpretation of the "doing business" test, which interpretation the comptroller again changed in 1986 to taxpayers' further detriment, the comptroller obtained a legislative solution to the issue. In 1989, § 111.002(a) of the Tax Code was amended to provide that the comptroller may adopt, repeal or amend rules that do not conflict with state laws or the Texas or United States constitutions to reflect changes in the power of the state to collect taxes and enforce the provisions of Title 2 of the Tax Code due to changes in the constitution or laws of the United States and judicial interpretations thereof. TEX. TAX CODE ANN. § 111.002(a) (Vernon Supp. 1991); see Ohlenforst & Dorrill, 1990 *Survey*, 44 Sw. L.J. 651, 657 n.67 (1990) (discussing this amendment).

B. Calculation of Taxable Capital

In Decision 24,165⁹³ the comptroller ruled that a transfer of funds from a wholly-owned subsidiary to its parent was a loan rather than a contribution to capital.⁹⁴ In rejecting the taxpayer's position that the transfer was a contribution, the comptroller stated that a transfer from a subsidiary to a parent cannot be a contribution to capital because the subsidiary has no equity or ownership interest in the parent.⁹⁵

In the last several years, several comptroller's decisions considered whether taxpayers were required to use push-down accounting⁹⁶ with respect to 1987 and prior report years.⁹⁷ The comptroller continues to issue administrative decisions providing that push-down accounting is required in these report years when the taxpayer uses push-down accounting on its books and records.⁹⁸ Although the challenge to the comptroller's position on this issue in *Southern Clay Products v. Bullock*⁹⁹ was unsuccessful (apparently because the taxpayer failed to submit sufficient documentary evidence of discriminatory application of the policy to a large class of other individuals¹⁰⁰), the taxpayer and the comptroller in *Capital Cable Co. v. Bullock*¹⁰¹ reached an agreement on this issue that resulted in a taxpayer refund.¹⁰²

93. Comptroller Hearing No. 24,165 (Feb. 21, 1990).

94. *Id.*

95. *Id.* The taxpayer's case probably suffered because it booked the transfer as an intercompany account receivable rather than a capital contribution. Comptroller Hearing No. 24,165. During the survey period, the normal plethora of decisions considered whether a purported loan to a corporation by a related entity was, in fact, a capital contribution and therefore part of the recipient's taxable capital. See, e.g., Comptroller Hearing No. 25,280 (July 9, 1990) (ruling against the taxpayer and focusing on risk and economic reality); Comptroller Hearing No. 24,768 (Dec. 21, 1989) (ruling in favor of the taxpayer and focusing on intent as established by books and records); and Comptroller Hearing No. 23,613 (Aug. 22, 1989) (ruling in favor of the taxpayer and focusing on economic reality).

96. Pursuant to the push-down accounting method, the value of a subsidiary's assets equals the fair market value of such assets as determined by allocating to such assets the consideration paid for the corporation by the new owner. See also Comptroller Hearing No. 20,278 (May 16, 1978) (discussion of push-down accounting method).

97. The determination of whether taxpayers are required to employ push-down accounting for report years after 1987 is governed by a different set of issues. In 1987, the Texas legislature amended § 171.109(b) of the Tax Code to provide that if generally accepted accounting principles (GAAP) are unsettled on an accounting practice for a particular purposes, the comptroller may establish rules to specify the applicable accounting treatment. TEX. TAX CODE ANN. § 171.109(b) (Vernon Supp. 1991). With respect to valuation of acquired corporation's assets, GAAP allows push-down accounting and historical cost accounting. Rule 3.391(c)(3) provides that if a majority of the voting stock of a corporation is acquired, the acquired corporation's assets must be revalued using push-down accounting. 34 TEX. ADMIN. CODE § 3.391(c)(3) (eff. Sept. 21, 1989, 14 Tex. Reg. 4599). Apparently, it is the comptroller's position that GAAP is unsettled on the issue of valuing the assets of an acquired corporation.

98. See Comptroller Hearing No. 24,107-A (Dec. 18, 1989).

99. 753 S.W.2d 781 (Tex. App.—Austin 1988, no writ) (discussed in Ohlenforst & Dorrill, 1990 Survey, 43 Sw. L.J. 579, 592-93 (1989)).

100. *Id.* at 784.

101. No. 426,893 (Dist. Ct. of Travis County, 126th Dist. of Texas, agreed final judgment entered on Oct. 10, 1990).

102. *Id.*

C. Allocation of Capital

The Austin Court of Appeals in *Bullock v. Marathon Oil Co.*¹⁰³ held that the comptroller's rule that treated receipts from barter exchange agreements as gross receipts for purposes of calculation of franchise tax was invalid.¹⁰⁴ During the 1987 franchise tax report period, Marathon Oil entered into agreements whereby Marathon exchanged certain oil products for other oil products.¹⁰⁵ In 1987 the comptroller amended Rule 3.403¹⁰⁶ to provide that deliveries of property pursuant to exchange agreements results in receipts, for franchise tax purposes.¹⁰⁷ This amendment reversed the comptroller's long-standing interpretation that receipts from such exchange agreements did not constitute receipts for franchise tax purposes.¹⁰⁸ Marathon sued for a declaratory judgment stating that the amendment was invalid. The court ruled that sections 171.103 and 171.105 of the Tax Code, defining gross receipts as, *inter alia*, the "sale" of property and "other business," are ambiguous.¹⁰⁹ In circumstances in which an administrative interpretation of an ambiguous statute is in effect at the time the legislature amends the statute (without making substantive changes), the legislature is deemed to have accepted the interpretation.¹¹⁰ Therefore, the comptroller could not change its interpretation without legislative authorization.¹¹¹

The comptroller ruled in Decision 25,039¹¹² that receipts from merchandise shipped by the taxpayer to duty-free stores or customs bonded warehouses located in Texas and then sold by the taxpayer at such locations and sent to a common or contract carrier in Texas for delivery outside the United States should be included as Texas receipts for purposes of determining the taxpayer's Texas gross receipts percentage.¹¹³ The taxpayer asserted two theories explaining why such receipts should not be considered Texas receipts. First, the specific locations where the sales took place are not subject to Texas jurisdiction. In rejecting the taxpayer's argument, the comptroller relied on the Texas Supreme Court's decision in *General Dynamics Corp. v. Bullock*,¹¹⁴ in which the court held that receipts from sales made on a federal enclave were subject to Texas franchise tax.¹¹⁵ Second, the taxpayer argued that treating such receipts as Texas receipts violates the United

103. 798 S.W.2d 353 (Tex. App.—Austin 1990, n.w.h.).

104. *Id.* at 357.

105. *Id.* at 355.

106. 34 TEX. ADMIN. CODE § 3.403 (1989).

107. *Id.*

108. *Marathon Oil Co.*, 798 S.W.2d at 357.

109. *Id.* at 358.

110. *Id.* at 357.

111. *Id.* After the amendment of Rule 3.403 in 1987, the Texas legislature added § 171.112 to the Tax Code, which provides that, except as otherwise provided, "a corporation must calculate gross receipts in accordance with generally accepted accounting principles." TEX. TAX CODE ANN. § 171.112(b) (Vernon Supp. 1991). It is thought that GAAP would exclude receipts from such exchanges from gross receipts. *Marathon Oil Co.*, 798 S.W. 2d at 357.

112. Comptroller Hearing No. 25,039 (Feb. 8, 1990).

113. *Id.*

114. 547 S.W.2d 255 (Tex. 1976), *cert. denied*, 434 U.S. 1009 (1977).

115. *Id.* at 258.

States constitution.¹¹⁶ The comptroller ruled that a tax on such receipts does not place an undue burden on interstate commerce and does not violate the Commerce Clause.¹¹⁷

In Decision 26,256¹¹⁸ the comptroller again interpreted the throw-back rule,¹¹⁹ which provides that gross receipts from business done in Texas include receipts from sales of tangible personal property shipped from Texas to a purchaser in another state in which the seller is not subject to taxation.¹²⁰ In determining whether the seller is not subject to taxation in another state, the fact that the taxpayer did not actually pay taxes in such state does not determine whether the taxpayer is subject to tax in such state for this purpose because Texas law is generally employed to make such determination.¹²¹ The taxpayer submitted into evidence travel receipts of employees and invoices for sales to customers in the other states at issue in order to demonstrate that the taxpayer was subject to tax in the states at issue.¹²² The travel receipts contained notations describing the purpose of the trips, which apparently was sales solicitation.¹²³ In spite of this evidence, the comptroller ruled that the taxpayer did not meet its burden of proof to establish that it was subject to tax in these states.¹²⁴

In Decision 24,239¹²⁵ the comptroller addressed whether the oil industry's model form joint operating agreements created joint ventures or partnerships for franchise tax purposes. The taxpayer acquired oil and gas properties developed under the oil industry's three model form operating agreements.¹²⁶ The model agreements provide that the liability of the parties is several, and that it is not the parties' intention to create a partnership.¹²⁷ The taxpayer contended that its interests in such properties are partnership interests, thus allowing the taxpayer to report its revenues from

116. Comptroller Hearing No. 25,039 (Feb. 8, 1990). In support of his position, the comptroller relied on Comptroller Hearing No. 11,083 (Jan. 12, 1984) (receipts from sales of missiles to the United States Government were Texas receipts); and *Bullock v. Enserch Exploration, Inc.*, 614 S.W. 2d 215 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (receipts from sales of natural gas to interstate pipeline companies, with delivery in Texas but ultimate transportation outside Texas, were Texas receipts), *cert. denied*, 455 U.S. 946 (1982).

117. Comptroller Hearing No. 25,039 (Feb. 8, 1990).

118. Comptroller Hearing No. 26,256 (Sept. 12, 1990).

119. *See* TEX. TAX CODE ANN. § 171.103(1) (Vernon Supp. 1991).

120. *Id.*

121. 34 TEX. ADMIN. CODE § 3.403(d)(1)(E) (eff. June 28, 1988, 13 Tex. Reg. 2971). The comptroller pointed out, however, that although evidence of actual payment of tax to another state is not required to prove that a taxpayer is subject to tax in another state, absence of such proof weighs heavily against the taxpayer. Comptroller Hearing No. 26,256 (Sept. 12, 1990).

122. *Id.*

123. *Id.*

124. *Id.* Rule 3.406(c)(4) is quite clear in providing that solicitations by an employee in Texas causes the employer to be subject to Texas franchise tax. *See* 34 TEX. ADMIN. CODE § 3.406(c)(4) (eff. Dec. 28, 1987, 12 Tex. Reg. 4702). Thus, it is difficult to understand why the comptroller ruled against the taxpayer, unless the comptroller did not believe that the travel receipts (along with the notations) were credible evidence. *See also* Hearing No. 22,645 (1988) (similar decision; discussed in Ohlenforst & Dorrill, 1990 *Survey*, 44 Sw. L.J. 651, 660-61 (1990)).

125. Comptroller Hearing No. 24,239 (Aug. 22, 1990).

126. *Id.*

127. *Id.*

the ventures on the basis of net revenues received.¹²⁸ The comptroller concluded that these model agreements do not create a partnership and the taxpayer cannot report revenues based on net revenues.¹²⁹ The comptroller reached a contrary result in circumstances in which the parties entered into a limited partnership agreement.¹³⁰

D. Procedure

Decision 25,403¹³¹ addressed the ability of a corporation whose surplus is less than \$1 million to change from the GAAP method of accounting to the federal income tax method of accounting. Section 171.109(c) of the Tax Code, as amended and effective August 31, 1987,¹³² provides that a corporation whose surplus is less than \$1 million, as determined pursuant to the accounting method used to compute its federal income tax, may report its surplus according to such federal income tax method.¹³³ Rule 3.391,¹³⁴ however, provides that the filing of a franchise tax report using either the GAAP method or the federal income tax method shall constitute an irrevocable election of such method for such reporting period.¹³⁵ The rule further provides that a corporation eligible to use the federal income tax method may change from the GAAP method to the federal income tax method no more than once every four years.¹³⁶ Rule 3.391 was adopted as an emergency rule in January 1988, and the regular rule containing identical provisions was adopted effective June 28, 1988.¹³⁷ On its original 1988 return, which was due March 15, 1988, the taxpayer used GAAP accounting.¹³⁸ The taxpayer later amended its return and used the federal income tax method of accounting.¹³⁹ The comptroller ruled that the taxpayer was charged with knowledge of the emergency rule when it filed its original return, and could not thereafter amend its return and elect a different accounting method.¹⁴⁰

128. Rule 3.403(e)(9) provides that receipts reflecting a corporate partner's share of the net profits from a partnership or joint venture are gross receipts of the partner for franchise tax purposes. 34 TEX. ADMIN. CODE § 3.403(e)(9).

129. *Id.* The comptroller relied on *Hamilton v. Texas Oil & Gas Corp.*, 648 S.W. 2d 316 (Tex. App.—El Paso 1982, no writ) (holding that such model agreements do not create a partnership or joint venture). Hearing No. 24,239 (Aug. 22, 1990).

130. *Id.* One other development with respect to the allocation of gross receipts is noteworthy. Two cases that were pending challenging the repeal of the optional three-factor formula for determining a taxpayer's gross receipts percentage were nonsuited. *See Delco Elec. Corp. v. Bullock*, No. 466,458 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, order of nonsuit entered Nov. 28, 1990); *General Motors Corp. v. Bullock*, No. 466,405 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, order of nonsuit entered Oct. 5, 1990).

131. Comptroller Hearing No. 25,403 (Jan. 29, 1990).

132. TEX. TAX CODE ANN. § 171.109(c) (Vernon Supp. 1991).

133. *Id.*

134. 34 TEX. ADMIN. CODE § 3.391 (eff. June 28, 1988, 13 Tex. Reg. 2970). The rule has since been amended. *See* 14 Tex. Reg. 4599 (1989).

135. *Id.*

136. *Id.*

137. 34 TEX. ADMIN. CODE § 3.391 (emergency rule eff. Jan. 1, 1988, 13 Tex. Reg. 160).

138. Comptroller Hearing No. 25,403 (Jan. 29, 1990).

139. *Id.*

140. *Id.* *See* Comptroller Hearing Nos. 25,689 (Feb. 22, 1990); and 25,137 (Sept. 25,

In Decision 25,673¹⁴¹ the comptroller addressed when the four year statute of limitations for filing claims for refund begins to toll in circumstances when the taxpayer is granted an extension of time for the filing of the annual franchise tax report. The taxpayer filed with the comptroller on June 13, 1989 an amended franchise tax report for its 1985 report year; based on the amended report, the taxpayer was entitled to a refund.¹⁴² Franchise tax reports for the taxpayer's 1985 report year were due March 15, 1985.¹⁴³ In accordance with the comptroller's rules, the taxpayer received an extension of time to file its report, paid taxes on March 15 based on estimates of the amount due, and filed its 1985 report and paid the additional tax due on June 17, 1985, the date allowed under the extension.¹⁴⁴ Pursuant to Rule 3.410,¹⁴⁵ if a corporation has been granted an extension to file its report, such corporation must pay by March 15 the lesser of 90 percent of the tax ultimately reported to be due or 100 percent of the tax paid the previous year.¹⁴⁶

The taxpayer contended that the amended franchise tax report was filed within the statute of limitations because it was filed within four years from the date "the last day on which a payment is required . . .,"¹⁴⁷ which it believed was June 17, 1985.¹⁴⁸ The comptroller disagreed, although the administrative law judge described the issue as a close case.¹⁴⁹ The comptroller concluded that for statute of limitations purposes the beginning date of the period of limitation was March 16, 1985, which was the date that was one day after the day on which payment of all or a substantial portion of the 1985 franchise tax was due.¹⁵⁰

E. Regulatory Developments

Unlike prior survey periods, the comptroller made few changes to the franchise tax rules during the survey period. One significant development was the adoption of new permanent Rule 3.415,¹⁵¹ which sets forth permissible methods for estimating oil and gas reserve volumes for corporations us-

1990). In similar circumstances, the comptroller disallowed the taxpayers' refund claims. Court cases are pending which should address the issue of the ability of the comptroller to categorize as irrevocable the selection by taxpayer of accounting methods. *See Weekly Homes, Inc. v. Bullock*, No. 483,836 (Dist. Ct. of Travis County, 299th Judicial Dist. of Texas, filed May 4, 1990).

141. Comptroller Hearing No. 25,673 (Apr. 10, 1990).

142. *Id.*

143. TEX. TAX CODE ANN. § 171.152(c) (Vernon Supp. 1991).

144. Comptroller Hearing No. 25,673.

145. 34 TEX. ADMIN. CODE § 3.410 (eff. Nov. 9, 1987, 12 Tex. Reg. 3924).

146. *Id.*

147. TEX. TAX CODE ANN. § 111.204 (Vernon 1982).

148. Comptroller Hearing No. 25,673. The taxpayer also unsuccessfully contended that its position was supported by Rule 3.410(c), which provides that in circumstances in which an extension is allowed, penalty and interest on late payments do not begin to accrue until the date of the extended due date for the report. 34 TEX. ADMIN. CODE § 3.410(c) (1989). Comptroller Hearing No. 25,673.

149. *Id.*

150. *Id.*

151. 34 TEX. ADMIN. CODE § 3.415 (eff. Dec. 1, 1989, 14 Tex. Reg. 6292).

ing the successful efforts or full cost method of accounting in preparing their franchise tax report. Under the successful efforts or full cost method of accounting, the volume of oil and gas reserves is employed to determine the amortization of intangible drilling costs.¹⁵² The rule allows four methods for estimating the volume of oil and gas reserves: (1) methods used to comply with Securities and Exchange Commission regulations; (2) an evaluation by a registered engineer; (3) the method used for property tax purposes; and (4) methods used by standard industry reserve estimating equations.¹⁵³

Rule 3.399¹⁵⁴ was amended to implement legislation exempting corporations engaged exclusively in recycling sludge and corporations organized by certain farmers' cooperatives from franchise tax.¹⁵⁵ The rule also imposes additional filing requirements on corporations seeking exemptions based on federal status.¹⁵⁶ New rule 3.416,¹⁵⁷ providing for a credit against franchise tax for certain domestic title insurance companies, was adopted to implement legislation.¹⁵⁸

New Rule 3.417¹⁵⁹ sets forth rules with respect to close and S corporations seeking to calculate their franchise tax using the accounting method used to determine federal income tax liability.¹⁶⁰ Also, the comptroller proposed to amend rule 3.391¹⁶¹ to provide more specific guidance on circumstances in which amended franchise tax reports may be filed.¹⁶²

III. PROPERTY TAX

A. Application of Tax

In *Haney v. Cooke County Tax Appraisal District*¹⁶³ the Fort Worth Court of Appeals rejected the appraisal district's appraisal of property that was determined by applying mass appraisal techniques.¹⁶⁴ The taxpayer successfully asserted that his real estate, consisting of a house, one acre of land, and a car wash facility, was worth substantially less than the value derived by the appraisal district, which utilized the sales prices of similar properties within the same area to determine a value. The appraisal district overvalued the property because it did not take into account the severe termite, settlement, and other damage to the buildings on the property and the poor construction quality of the buildings.¹⁶⁵ The court, while concluding that mass appraisals are generally accepted techniques, held that the Tax Code requires that

152. *Id.* § 3.415(c).

153. *Id.* § 3.415(a).

154. 34 TEX. ADMIN. CODE § 3.399 (eff. Jan 23, 1990, 15 Tex. Reg. 117).

155. *Id.*

156. *Id.* § 3.399(e).

157. 34 TEX. ADMIN. CODE § 3.416 (eff. Jan 23, 1990, 15 Tex. Reg. 117).

158. *Id.* § 3.416(b).

159. 34 TEX. ADMIN. CODE § 3.417 (eff. Oct. 4, 1990, 15 Tex. Reg. 5502).

160. *Id.*

161. 34 TEX. ADMIN. CODE § 3.391 (proposed Dec. 7, 1990, 15 Tex. Reg. 7011).

162. *Id.*

163. 782 S.W.2d 349 (Tex. App.—Fort Worth 1989, no writ).

164. *Id.* at 352.

165. *Id.* at 350-52.

property must be appraised based upon the individual characteristics that affect the property's market value.¹⁶⁶

B. Exemptions

In *City of Shenandoah v. Jimmy Swaggart Evangelistic Association*¹⁶⁷ the Beaumont Court of Appeals was called upon to address the propriety of the district court's permitting a religious organization to present evidence as to its tax-exempt status in a suit by the taxing authority for the collection of delinquent ad valorem taxes. With respect to tax years 1982 through 1987, the court held that section 42.09 of the Texas Tax Code¹⁶⁸ prohibited the organization from offering evidence of a claim of tax exemption in the taxing jurisdiction's suit to collect tax.¹⁶⁹ Section 42.09 provides an exclusive list of grounds of protest a property owner may raise in defense to a suit to enforce collection of delinquent taxes; a claim of tax exemption is not a listed ground.¹⁷⁰ With respect to tax years 1980 and 1981, however, the court concluded that the trial court properly permitted the organization to raise the issue of tax exemption because the relevant statutes for such years did not set out a procedure by which to request or claim tax-exempt status as a religious organization.¹⁷¹ Section 1 of article 7150,¹⁷² which set forth the application procedure in effect prior to the adoption of the Tax Code for exemptions, was repealed on January 1, 1980. Section 11.43 of the Tax Code,¹⁷³ setting forth the application procedure under the Tax Code for exemptions, became effective on January 1, 1982.¹⁷⁴ Because there was no set statutory scheme for applying for exemptions for the 1980 and 1981 tax years, the court held that due process required that the organization be permitted to raise such issues in defense of the taxing authority's delinquent tax suit for the 1980 and 1981 tax years.¹⁷⁵

The Corpus Christi Court of Appeals in *Sharyland Water Supply Corp. v. Hidalgo County Appraisal District*¹⁷⁶ held that a corporation organized for

166. *Id.* at 352. See also *Brazos County Appraisal Dist. v. Sun Operating Ltd. Partnership*, 778 S.W.2d 130, 132 (Tex. App.—Texarkana 1989, no writ) (valuation of plant reduced approximately eight fold because taxpayer able to demonstrate that plant had no market value except as salvage property).

167. 785 S.W.2d 899 (Tex. App.—Beaumont 1990, writ denied).

168. TEXAS TAX CODE ANN. § 42.09 (Vernon Supp. 1991).

169. *City of Shenandoah*, 785 S.W.2d at 903.

170. TEX. TAX CODE ANN. § 42.09(b) (Vernon Supp. 1991).

171. *City of Shenandoah*, 785 S.W.2d at 904.

172. TEX. REV. CIV. STAT. ANN. art. 7150 (Vernon 1960) (repealed 1979).

173. TEX. TAX CODE ANN. § 11.43 (Vernon 1982 and Supp. 1991).

174. *City of Shenandoah*, 785 S.W.2d at 904.

175. *Id.* at 904-05. In determining the validity of the taxing authority's argument that there was insufficient evidence to support the jury's conclusion as to the percentage of property that was entitled to a religious exemption in the 1980 and 1981 tax years, the court of appeals ruled in favor of the taxpayer. *City of Shenandoah*, 785 S.W.2d at 905. The court's ruling was apparently based on its inability to review the entire evidence presented to the jury. Part of the evidence heard by the jury was a recording of a typical broadcast of the radio station. This recording was played to the jury, absent objection by the taxing authority, without being formally introduced into evidence. Therefore, the appellate court could not review the recording. *Id.*

176. 783 S.W.2d 297 (Tex. App.—Corpus Christi 1989, writ granted).

charitable purposes did not qualify as a tax-exempt charitable organization for ad valorem tax purposes because the corporation did not demonstrate that it pledged its assets for the performance of charitable functions.¹⁷⁷ In order for an organization to be treated as an exempt charitable organization under section 11.18 of the Tax Code,¹⁷⁸ the organization must engage exclusively in one or more of the charitable functions provided in section 11.18(d) of the Tax Code.¹⁷⁹ Sharyland performed exclusively one of these functions — acquiring, storing, transporting, selling or distributing water for public use. In addition, section 11.18(f)(1) of the Tax Code¹⁸⁰ provides that a qualified organization is not exempt from property tax unless it pledges its assets for use in performing the organization's charitable functions.¹⁸¹ Although Sharyland's articles of incorporation provided that it was formed "for the purpose of furnishing a water supply for general farm use and domestic purposes to individuals . . .,"¹⁸² the court ruled that because nothing in Sharyland's charter, bylaws, or other regulations made a pledge of its assets for exempt uses, Sharyland did not meet the pledge requirement.¹⁸³

In *Irving Independent School District v. Packard Properties, Ltd.*¹⁸⁴ the United States District Court held that the Federal Deposit Insurance Corporation (FDIC), acting as a receiver for a savings and loan association, was exempt from penalties and interest for nonpayment of property taxes because federal law exempts the FDIC from payment of such amounts.¹⁸⁵ Section 1825(b)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989¹⁸⁶ provides that the FDIC is exempted from all state, county, or local taxes except to the extent such taxes are imposed according to the value of real property owned by the FDIC.¹⁸⁷ The taxing units argued that the penalty and interest impositions at issue are purely compensatory in nature and are not penalties and interest within the meaning of section 1825(b)(3).¹⁸⁸ The court reasoned that the impositions at issue are on their face penalty provisions.¹⁸⁹

177. *Id.* at 300.

178. TEX. TAX CODE ANN. § 11.18 (Vernon Supp. 1991).

179. *Id.*

180. TEX. TAX CODE ANN. § 11.18(f)(1) (Vernon Supp. 1991).

181. *Id.*

182. *Sharyland Water Supply Corp.*, 783 S.W.2d at 298.

183. *Id.* at 300. In support of its conclusion, the court cited *North Alamo Water Supply Corp. v. Willacy County Appraisal Dist.*, 769 S.W. 2d 690, 693 (Tex. App.—Corpus Christi 1989, writ granted). In this case, an organization which apparently met all of the requirements in § 11.18 of the Tax Code other than expressly pledging in its charter or bylaws its assets for use in a charitable function was found to be nonexempt. *Id.*

184. 741 F. Supp. 120 (N.D. Tex. 1990).

185. *Id.* at 124.

186. 12 U.S.C. § 1825(b)(3) (1989).

187. *Id.*

188. *Irving Indep. School Dist.*, 741 F. Supp. at 123.

189. *Id.* at 124. The United States District Court relied on the Fifth Circuit's decision in *Reconstruction Finance Corp. v. Texas*, 229 F.2d 9 (5th Cir. 1956), *cert. denied*, 351 U.S. 907 (1956), which decided a similar question with respect to the predecessor statute of §§ 33.01 and 33.07 of the Tax Code (the penalty and interest provisions). TEX. TAX CODE ANN. §§ 33.01, 33.07 (Vernon 1982).

C. Procedure

Two important cases decided during the survey period interpreted section 42.08 of the Tax Code.¹⁹⁰ Section 42.08 provides that a taxpayer who appeals an order of an appraisal review board to the district court must pay taxes on the subject property in an amount equal to the greater of the amount of taxes not in dispute or the taxes paid on the property in the preceding year.¹⁹¹ These taxes must be paid before the delinquency date or the property owner forfeits the right to proceed to a final determination of the appeal.¹⁹² Section 42.08(d) of the Tax Code¹⁹³ provides, however, that if the property owner "has substantially but not fully complied with . . ." section 42.08, the court must dismiss the case unless the property owner fully complies with the court's determination¹⁹⁴ within thirty days.

In *Wildwood Development v. Gregg County Appraisal District*¹⁹⁵ the Texarkana Court of Appeals addressed whether a taxpayer automatically forfeited its right to a district court review of the appraisal review board's determination of the taxable value of the taxpayer's property solely because the taxpayer tendered to the district court amounts required to be paid pursuant to section 42.08(b) of the Tax Code¹⁹⁶ rather than tendering such amounts to the proper taxing authority. The court held that the taxpayer substantially complied with section 42.08 by tendering to the registry of the court the taxes that were paid on the property in the preceding year (plus an additional amount to avoid delay in the event the property was sold).¹⁹⁷

In ruling against the taxpayer, the Amarillo Court of Appeals held in *Harris County Appraisal District v. Consolidated Capital Properties IV*¹⁹⁸ that payment of taxes to a taxing authority two and one-half months after the due date did not constitute substantial compliance¹⁹⁹ with section 42.08 of the Tax Code (as in effect for 1986 property taxes).²⁰⁰ The court reasoned that a mandatory time requirement for appeal cannot be substantially complied with; one either meets the time requirement or one does not.²⁰¹ The Amarillo Court of Appeals expressly disagreed with the Houston [1st District] Court of Appeals' holding in *Harris County Appraisal District v. Krupp Realty Limited Partnership*,²⁰² in which the court ruled that a late payment

190. TEX. TAX CODE ANN. § 42.08 (Vernon Supp. 1991).

191. *Id.* § 42.08(b).

192. *Id.*

193. *Id.* § 42.08(d).

194. *Id.*

195. 780 S.W.2d 434 (Tex. App.—Texarkana 1989, writ denied).

196. TEX. TAX CODE ANN. § 42.08(b) (Vernon Supp. 1991).

197. *Wildwood Dev.*, 780 S.W.2d at 435. In 1989, the Texas legislature amended § 42.08 of the Tax Code by, *inter alia*, adding a new subsection providing that a property owner that pays the amount of taxes greater than that required under § 42.08(b) does not forfeit the property owner's right to a final determination of the appeal by making the payment. Apparently, § 42.08, as in effect before this amendment, applied to the tax year at issue in *Wildwood*.

198. 795 S.W.2d 39 (Tex. App.—Amarillo 1990, writ denied).

199. *Harris County Appraisal Dist.*, 795 S.W.2d at 41.

200. TEX. TAX CODE ANN. § 42.08 (Vernon Supp. 1991) (amended 1989).

201. *Harris County Appraisal Dist.*, 795 S.W.2d at 41.

202. 787 S.W.2d 513 (Tex. App.—Houston [1st Dist.] 1990, no writ).

of taxes should not prevent the property owner from being considered to have substantially complied with section 42.08.²⁰³

In *City of Weatherford v. Parker County*²⁰⁴ the Texas Supreme Court held that section 6.26 of the Tax Code,²⁰⁵ which provides procedures by which voters of an appraisal district may elect to consolidate assessing and collection functions, is unconstitutional.²⁰⁶ In rendering this decision, the court relied on article III, section 64(a) of the Texas Constitution,²⁰⁷ which provides that the legislature by special statute may provide for consolidation of governmental functions of any political subdivisions located within any county.²⁰⁸ Because section 6.26 of the Tax Code is a general statute, the court ruled that the section is unconstitutional.²⁰⁹

In *Webb County Appraisal District v. New Laredo Hotel, Inc.*²¹⁰ the Texas Supreme Court held that an appearance by the taxpayer, either personally, by representative, or by affidavit, at a protest hearing is a jurisdictional prerequisite to an appeal to district court of an adverse determination of a property valuation issue by the appraisal review board.²¹¹ The taxpayer purchased a hotel and timely filed a protest after the appraisal district appraised the hotel for over fifty percent more than the taxpayer paid for the hotel. At the protest hearing the taxpayer neither appeared nor filed an affidavit. The taxpayer then filed suit in district court.

In addressing the taxing unit's motion to dismiss for want of jurisdiction, the court relied on section 41.45(b) of the Tax Code.²¹² The section provides, in part, that the taxpayer may offer his evidence or argument by affidavit without personally appearing if he submits an affidavit to the board before the hearing begins.²¹³ The taxpayer argued that this section does not require an appearance by the taxpayer or an affidavit; rather, such appearances are merely precatory.²¹⁴ In support of its position, the taxpayer relied on the statute's use of the word "may." In reversing the court of appeals, the Texas Supreme Court ruled that the sentence at issue is meant to provide

203. *Id.* at 515.

204. 794 S.W.2d 33 (Tex. 1990).

205. TEX. TAX CODE ANN. § 6.26 (Vernon 1982 and Supp. 1991).

206. *City of Weatherford*, 794 S.W.2d at 35.

207. TEX. CONST. art III, § 64(a).

208. *Id.*

209. *City of Weatherford*, 794 S.W.2d at 34-35. The taxing authorities argued unsuccessfully that the provision in article III, § 64(a) of the Texas constitution providing that such actions be taken pursuant to a special statute is merely permissive, not exclusive, and that the legislature's broad authority under article III, § 1, and article VIII, § 18 of the Texas constitution to enact general laws gives the legislature the authority to enact the provisions set forth in § 6.26 of the Tax Code.

210. 792 S.W.2d 952 (Tex. 1990).

211. *Id.* at 955.

212. TEX. TAX CODE ANN. § 41.45(b) (Vernon Supp. 1991).

213. *Id.*

214. *Webb County Appraisal Dist.*, 792 S.W.2d at 953. The dissent, however, agrees with the taxpayer, and points out that when the Texas legislature intended appearance by a taxpayer at a particular hearing to be mandatory, it employs mandatory language, such as "must appear" and "shall appear" rather than "is entitled to an opportunity to appear." *Id.* at 956 (Hecht, J., dissenting).

how the taxpayer may appear rather than giving taxpayers a choice of appearing or not.²¹⁵

In overruling a prior Attorney General's opinion, the Attorney General ruled that section 31.04 of the Tax Code²¹⁶ does not forbid the establishment of the delinquency date and the imposition of penalties and interest in circumstances in which no tax bill is sent because of an unknown address of the taxpayer.²¹⁷ Section 31.04(a) of the Tax Code provides that if tax bills are mailed after January 10, the delinquency date is postponed until a specified period after the notice is mailed.²¹⁸ Section 31.04(e) provides that the postponed delinquency date is the date used to determine the amount of penalties and interest charged for late payment.²¹⁹ The Attorney General previously had interpreted section 31.04 to provide that if no notice was mailed, a delinquency date is never established.²²⁰ In reversing its opinion on the issue, the Attorney General relied on section 31.01(g) of the Tax Code, which provides that the failure to send a tax bill does not affect the validity of the tax, penalty, or interest.²²¹ The Attorney General interpreted section 31.04 not to conflict with section 31.01 of the Tax Code²²² by reading section 31.04 to govern only in instances in which a tax bill can be sent but is mailed late.²²³

D. Legislation

In 1989, the voters of Texas approved a constitutional amendment (commonly called the freeport exemption) exempting from ad valorem taxation certain goods, wares, merchandise, other tangible personal property, and ores, other than oil, natural gas, and other petroleum products, that are located in Texas for no longer than 175 days.²²⁴ The law allowed counties, common or independent school districts, junior college districts, and municipalities, including home-rule cities, to tax freeport goods for the tax year 1991 and beyond if official action to tax such property was taken before April 1, 1990.²²⁵ In spite of the voters' approval of the freeport exemption,

215. *Webb County Appraisal Dist. v. New Laredo Hotel, Inc.*, 792 S.W. 2d 952, 935 (Tex. 1990). The taxpayer also argued that *Keggereis v. Dallas Cent. Appraisal Dist.*, 749 S.W. 2d 516 (Tex. App.—Dallas 1988, no writ), provided support for its position. *Id.* at 954. The court in *Keggereis* held that the denial of a hearing can be rectified by a new trial. The Texas Supreme Court, however, denied that the *Keggereis* case had any relevance to the issue at hand. *Id.* In the case at issue, the taxpayer was not denied a hearing; rather, a hearing was held but the taxpayer chose not to appear. *Id.*

216. TEX. TAX CODE ANN. § 31.04 (Vernon Supp. 1991).

217. Op. Tex. Att'y Gen. No. JM-1192 (1990).

218. TEX. TAX CODE ANN. § 31.04(a) (Vernon Supp. 1991).

219. *Id.* § 31.04(e).

220. Op. Tex. Att'y Gen. No. 89-60 (1989)(overruled 1990).

221. TEX. TAX CODE ANN. § 31.01(g) (Vernon 1982 and Supp. 1991).

222. *Id.* § 31.01.

223. Op. Tex. Att'y Gen. No. JM-1192 (1990). The Attorney General also concluded that a contrary reading of § 31.04 would conflict with § 33.04 of the Tax Code, which provides that a tax collector's only notification duty to a delinquent taxpayer is by newspaper if the taxpayer's address cannot be determined. TEX. TAX CODE ANN. § 33.04 (Vernon Supp. 1991). Op. Tex. Att'y Gen. No. JM-1192 (1990).

224. TEX. CONST. art. VIII, § 1-j. The Texas legislature added § 11.251 to the Tax Code to implement this constitutional amendment.

225. TEX. CONST. art. VIII, § 1-j(b). If official action was taken before January 1, 1990,

according to a State Property Tax Board survey, of the 2,333 counties, school districts, municipalities and college districts reporting to the board their actions on the freeport exemption, almost 75 percent took official action to tax freeport goods.²²⁶

IV. OTHER SIGNIFICANT CHANGES: NEW SUCCESSOR LIABILITY, NEW PROCEDURE AND NEW COMPTROLLER

Successor liability continues to be an increasingly real risk for Texas entities. Although the Tax Code formerly held successors liable only with respect to sales tax,²²⁷ legislative changes made during 1989 extended the scope of successor liability to other taxes, including franchise taxes.²²⁸ Recent administrative decisions (including those discussed above)²²⁹ reaffirm that taking over substantially all the assets of a pre-existing business can result in unexpected liability for purchasers.

The law has long provided that corporate officers may become liable for debts of the corporation, including taxes, in circumstances in which the corporate charter is forfeited for failure to pay taxes.²³⁰ In addition, the attorney general has recently been successful in asserting that corporate officials may be liable for corporate sales taxes in circumstances in which the corporation has collected the sales taxes but failed to pay them over to the state.²³¹ Although there are no reported decisions on this particular issue, some of the recent cases are on appeal and a decision may be reported during the 1992 survey period.

The comptroller has made further efforts to protect the state from delinquent taxpayers by revising the administrative rule on bond or other securities for delinquent taxes to specify that a bank letter of credit is acceptable security only when deemed by the comptroller to be "sufficient in amount and secure."²³²

Two court cases addressed the proper forum for a taxpayer's challenge of a Texas tax. In *McQueen v. Bullock*²³³ the taxpayer filed a request for a preliminary injunction in Federal District Court to stay enforcement of unpaid diesel fuel taxes due under the Texas Tax Code. Concluding that the taxpayer would have been able to challenge the constitutionality of the tax in

the property could also be taxed for the 1990 tax year. A taxing authority may subsequently rescind its action to tax freeport goods, but failure to tax such property by May 30, 1990, or a rescission of an action to tax such property, is irrevocable. *Id.*

226. STATE PROPERTY TAX BOARD FREEPORT SURVEY, STATE PROPERTY TAX BOARD (1990). This survey is available from the State Property Tax Board. The survey lists how each reporting taxing unit acted on the freeport exemption. Almost 85 percent of school districts elected to tax freeport goods. Approximately 78 percent, 63 percent and 81 percent of counties, municipalities, and college districts, respectively, elected to tax freeport goods. *Id.*

227. See TEX. TAX CODE ANN. § 151.613 (Vernon 1982) (repealed 1987).

228. See TEX. TAX CODE ANN. § 112.020 (Vernon Supp. 1991).

229. See *supra* note 45 and accompanying text.

230. See, TEX. TAX CODE ANN. § 171.255 (Vernon 1982).

231. *Stalarow v. Texas*, appeal pending, No. 3-90-225 CV (Tex. App.—Austin) (district court judgment entered July 31, 1990).

232. 34 TEX. ADMIN. CODE § 3.327 (eff. Sept. 18, 1990, 15 Tex. Reg. 5062-63).

233. 907 F.2d 1544 (5th Cir. 1990).

district court, without having to first pay the tax, the court found that the taxpayer had a plain, speedy, and efficient remedy and was therefore precluded by the Tax Injunction Act²³⁴ from bringing suit in Federal District Court.²³⁵

The taxpayer in *Texas Alcoholic Beverage Commission v. Macha*²³⁶ challenged on due process grounds the Alcoholic Beverage Commission's suspension of a liquor permit. The case is interesting for its holding that section 112.001 of the Tax Code²³⁷ did not bar jurisdiction in the District Court of Amarillo; the court concluded that the taxpayer's suit was not a "taxpayer suit" within the meaning of section 112.01 since Macha had based his claims on due process grounds and not on tax issues.²³⁸

A new rule dealing with discovery in connection with an administrative hearing²³⁹ specifically allows certain discovery, but limits each party to only two sets of interrogatories, each of which may require no more than thirty answers (unless the parties agree otherwise).²⁴⁰ The rule affirmatively notes that an administrative law judge may subpoena witnesses, commission oral depositions, and require entry on any party's premises "for the purpose of doing any act or making any inspection not protected by privilege and reasonably calculated to lead to the discovery" of material evidence.²⁴¹ These changes are likely to make the administrative process more thorough, but also more complex and possibly more expensive, than it has traditionally been. On the other hand, the service rule has been relaxed to allow service by facsimile transmission.²⁴²

One of the most significant changes in the administration of Texas taxes is the change in the office of the comptroller. John Sharp became comptroller in January 1991 after Bob Bullock's sixteen year tenure as comptroller. Sharp quickly issued an operational directive that reorganized the agency into four functional areas: tax administration, fiscal management, revenue administration, and central administration. Although there have been significant personnel changes in the comptroller's office, many experienced comptroller representatives remain on staff. As in the past, the comptroller's office is expected to be a significant legislative influence. The legislature is almost certain to enact substantial legislative tax changes during the coming

234. 28 U.S.C. § 1341.

235. *McQueen*, 907 F.2d at 1546-50.

236. 780 S.W.2d 939 (Tex. App.—Amarillo 1989, writ denied).

237. TEX. TAX CODE ANN. § 112.001 (Vernon Supp. 1991) (providing that courts of Travis County have "exclusive, original jurisdiction of a taxpayer suit brought under this chapter.")

238. "Nowhere in his pleadings did Macha allege the actual tax assessment was incorrect or that its collection . . . was unlawful It is clear that Macha pleaded classic due process issues, not tax issues." *Macha*, 780 S.W. 2d at 941. Macha's victory was a hollow one; the Court ultimately concluded that summary suspension of Macha's license did not violate direct due process. *Id.* at 944.

239. 34 TEX. ADMIN. CODE § 1.33 (eff. April 27, 1990, 15 Tex. Reg. 2169) (text of rule appears at 15 Tex. Reg. 1228).

240. *Id.* § 1.33(e).

241. *Id.*

242. 34 TEX. ADMIN. CODE § 1.32 (eff. March 29, 1990, 15 Tex. Reg. 1516).

survey period; both those changes and the regulatory changes they necessitate will play an important part in developing the Texas tax system.